

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In re:)	
)	
ROCKY BRYANT,)	Adv. No. 97-6166
)	
Debtor,)	
)	
_____)	
)	SUMMARY ORDER
CHEVY CHASE BANK,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 97-20006
)	
ROCKY BRYANT,)	
)	
Defendant.)	
_____)	

Chevy Chase Bank ("Bank") filed this adversary proceeding alleging Rocky Bryant (the "Debtor") committed fraud in use of his credit card, thus making the credit card debt nondischargeable under 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(2)(C). The Bank moves for summary judgment.

FACTUAL BACKGROUND

The Debtor filed his petition for relief under Chapter 7 of Title 11, United States Code, on January 7, 1997. Prior to the filing and between October 15, 1996 and October 20, 1996, the Debtor took cash advances on his credit card in the amount of \$3,450.00.

DISCUSSION

Credit obtained within 60 days before the order of relief aggregating more than \$1,000.00 for "luxury goods or services" are excepted from discharge. 11 U.S.C. 523(a)(2)(C).

The facts are undisputed. The charges were made between October 15th and 20th, 1996. The Debtors petition was filed January 7, 1997. Thus, the charges were not incurred within the 60 day window provided by the statute.

However, any debt for money, property, or services is exempt from discharge to the extent obtained by false pretenses or actual fraud. 11 U.S.C. § 523(a)(2)(A). In this case, the Bank alleges actual fraud on the part of the Debtor in incurring the charges.

To prove actual fraud, a creditor must establish the following elements:

1. the debtor made the representations;
2. that at the time he knew they were false;
3. that he made them with the intention and purpose of deceiving the creditor;

4. that the creditor relied on such representations,
and

5. that the creditor sustained the alleged loss and
damage as the proximate result of the representations having
been made.

In re Eashai, 87 F.3d 1082, 1086 (9th Cir. 1996) citing
Britton v. Price (In re Britton), 950 F.2d 604, 604 (9th
Cir. 1991).

"When the card holder uses his credit card, he makes a
representation that he intends to pay the debt. . . .
Thus, the central inquiry in determining whether there was a
fraudulent representation is whether the card holder lacked
an intent to repay at the time he made the charge." *In re*
Anastas, 94 F.3d 1280, 1285 (9th Cir. 1996). Twelve
nonexclusive, nondispositive factors have been adopted by
the Ninth Circuit for proving fraudulent intent.¹

¹ The factors are: (1) the length of time between the
charges and the bankruptcy filing; (2) whether or not an
attorney had been consulted concerning the filing of
bankruptcy before the charges were made; (3) the number of
charges made; (4) the amount of the charges; (5) the financial
condition of the debtor at the time the charges were made; (6)
whether the charges were above the credit limit of the
account; (7) whether the debtor made multiple charges on the
same day; (8) whether or not the debtor was employed; (9) the
debtor's prospects for employment; (10) the financial
sophistication of the debtor; (11) whether there was a sudden
change in the debtor's buying habits; and (12) whether the
purchases made were for luxuries or necessities.

In re Hashemi, 104 F.3d 1122, 1126 n.2 (9th Cir. 1997).

Consideration of these factors should show, on balance, the debtor's fraudulent intent, if any. *In re Hashemi*, 104 F.3d 1122, 1126 (9th Cir. 1997). Applying these factors to the facts of this case, there is ample evidence to indicate the Debtor intended to pay the charges incurred.

The charges were made over 60 days prior to the filing; were made over a period of a few days; in a total amount which did not exceed the credit limit, and were made while the Debtor was employed. The Debtor claims he incurred the charges for the benefit of a friend, Lorrie Malone, who needed some emergency medical services, thus, the charges were for necessities rather than luxuries. The Debtor claims Ms. Malone told him her parents would pay him for the charges and his reliance upon her promises speaks to his financial sophistication. The Debtor further claims he consulted no attorney prior to the charges but sought legal counsel only when it became evident that the promised repayment would not be forthcoming.

The Bank disputes the existence of Ms. Malone and the promise of payment by third parties. Whether Ms. Malone made the statements or not, the Debtor believed at the time of the charges that he would repay them. The Bank has offered no evidence relative to the Debtor's intent at the time of the charges. I find from the evidence presented,

the Debtor had an intent to pay the Bank at the time he made the charges.

"[T]he representation made by the card holder in a credit card transaction is not that he has an ability to repay the debt; it is that he has an intention to repay." *In re Anastas*, 94 F.3d 1280, 1285 (9th Cir. 1996). The Debtor's reliance on third parties for the source of funds to repay the debt reflects his ability to pay rather than his intent to pay.

The debtor has also sworn in his affidavit that he had not consulted an attorney prior to incurring the charges on his credit card and that he was employed at the time of the charges. The Bank has offered no evidence to dispute the veracity of the Debtor's statements. I conclude the Debtor did not incur his credit card debt in anticipation of bankruptcy.

Accordingly, it is

ORDERED:

The Bank's motion for summary judgment is denied and the Debtor's motion for dismissal is granted.

Dated this 2nd day of February, 1998.

ALFRED C. HAGAN
UNITED STATES BANKRUPTCY JUDGE

ACH:jbc